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No. 8, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ARIZONA, *Plaintiff*,

v.

STATE OF CALIFORNIA, ET AL., *Defendant*.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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Plaintiff,

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State of California, et al.,

Defendant.

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE BY THE 'PYRAMID LAKE INDIAN TRIBE'.

The Pyramid Lake Indian Tribe respectfully requests permission to file a brief, as amicus curiae, in support of the recommendations of the Special Master and the position of the United States and the five Indian Tribes on the question of the ability of the United States and the Tribes to assert claims for

water which were not raised in the earlier proceedings in this case. Consent to the filing of this amicus brief was refused by the State of Arizona and a majority of other parties taking exception to the Report of the Special Master.

The Pyramid Lake Tribe and its members have been severely hurt by the failure of the United States to assert water rights required for the Pyramid Lake fishery in an adjudication of rights to the use of water from the Truckee River in Nevada. The Tribe is now engaged in a series of lawsuits designed to rectify that omission. E.g., United States v. Truckee Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981), modified, 666 F.2d 351 (1982), petitions for cert. pending __ U.S.L.W. _____ (June , 1982). In that litigation, amicus and the

United States seek the recognition of rights to the use of water from the Truckee River in sufficient quantity to restore and maintain the now devasted tribal fishery in Pyramid Lake. The defendants have asserted that those claims are precluded by the failure of the United States to assert such rights in the earlier adjudication. The litigation in which the Pyramid Lake Tribe is now engaged raises issues related to the question in the present case of the ability of the United States and the Tribes to claim water for the "omitted" lands. Although the issues in the Pyramid Lakes Tribe's litigation are distinguishable, the resolution of those issues may be affected by the resolution of this case.

The argument of the Tribe here re-

sponds to the contention that the Five Tribes in this case should be denied their proper share of Colorado River water because of the uncertainty which that result might cause for parties to other water rights litigation. This brief is intended to show that the recommendation of the Special Master reflects the unique circumstances of the present controversy and does not generally implicate the authority of the United States to represent tribal interests in litigation. The discussion of this issue in the Tribe's amicus brief extends beyond that in the Master's Report and presents the issue from a different perspective than that of the parties.

Respectfully submitted,

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Brief of Amicus Curiae

SUMMARY OF ARGUMENT

The Special Master found that Article IX of the 1964 Decree in this case (376 U.S. 340) permits modification or amendment of the provisions of Article II(D) (1)-(5) which govern the allocation of water to the Five Indian reservations along the lower Colorado.

See generally Report at 29-55. The invocation of that authority is fully warranted since innocent Indian Tribes would otherwise bear the consequences of the failure of the United States to claim, on their behalf, sufficient water to meet the standard so carefully crafted by the Court and its previous Master to ensure that the Tribes are able to satisfy their present and future needs for water. 373 U.S. at 600-01.

ARGUMENT

THE COURT SHOULD EXERCISE THE AUTHORITY OF ARTICLE IX TO PROVIDE THE FIVE TRIBES WITH THE FULL AMOUNT OF WATER TO WHICH THEY ARE ENTITLED.

The Master's recommendation to modify the 1964 allocation of water for use on the Five Reservations encompassed a determination that Article IX of the 1964 Decree provided authority for the requested modifications and that the present circumstances justify the invocation of that authority. The discussion of the preclusive effect of federal representation of tribal interests by the various State Parties and amici curiae Salt River Project Agriculture Improvement District, et al, confuses these two distinct aspects of the Master's thoughtful consideration of the omitted lands question. We turn first to the meaning of Article IX.

The Master carefully examined the history and the language of Article IX in seeking to determine its meaning. Report at 29-34. He found "that the Court, by employing a broadly-drafted Article IX, retained the power to make virtually any modification in its 1964 Decree that it deemed proper 'in relation to the controversy'". Report at 35. The conclusion that the Court retained sufficient authority in its earlier decree to make the desired changes made it unnecessary to consider other concepts which would permit the Tribes and the United States to assert claims which the United States might have asserted in the earlier phase of the proceedings. Thus, this case turns on the specific language of the earlier decree and is not, contrary to the suggestions of the State Parties and

Amici, the prelude to a multitude of attacks on other decrees in other cases. It, indeed, is doubtful that even in this case, the Master's Report would provide support for similar modifications at a later date, given its focus on the special circumstances here, such as the inclusion of Article IX, the timing of the Tribal claims relative to the resolution of the non-Indian Present Perfected Rights and the complexity and magnitude of the earlier proceedings.

Having decided that in his view Article IX authorizes modifications such as those requested by the Tribes and United States, the Master addressed the question of whether he should recommend to the Court that it exercise this discretionary authority. Again, focusing on the circumstances present in this

case, he found the exercise of that authority well warranted. His conclusion in part rests on his difficulty in "determining from the testimony exactly what significant, different action the State Parties would have actually taken if the Indian Reservations had received in 1964 the water rights now requested." And, as the Master noted, at least before him, all parties admitted to "the existence of irrigable lands which were 'omitted' from the claim for water rights in the earlier proceedings". Report at 47 (emphasis in original). Finally, the Master expressed his concern that "the Tribes would bear the burden of this injustice" although they were not parties to the original hearings. Report at 48. Thus, the Master concluded:

> In my view Article IX should be used in this case as an instrument of justice to give the Tribes what rightfully belongs to them. That

> provision clearly reserves such power for the Court and this matter constitutes sufficient good reason to risk upsetting whatever reliance may have been based upon the Court's prior conclusions.

Report at 48.

His conclusion that the Tribes should not be saddled with the earlier mistakes of the United States is fully justified. In the previous proceedings, the Master and the Court concluded that although the Tribes were entitled to sufficient water to satisfy their present and future requirements, the State Parties had a need to know how much water is reserved for that purpose. The Master and the Court settled on the "practicably irrigable" standard as the vehicle to satisfy both objectives. Surely, the Tribes cannot be faulted for asking to have that standard correctly applied. No need exists to belabor the vital impor-

tance of irrigated agriculture on Indian reservations if those reservations are to become the permanent homelands envisioned at their origin. And, this Court, the Congress and the Tribes themselves have all recognized the need for agricultural development on these reservations. E.g., Arizona v. California, 373 U.S.546, 599; Tr. 1349-55. That worthy objective should not be frustrated or impeded by the failure of the United States to assert the full claim to water to which these Tribes are entitled.

The State Parties and Amici suggest that the Master's conclusions will disturb a host of matters long thought to be resolved. See Exceptions of the States of Arizona, California, and Nevada and the other California Defendants to the Report of Special Master

Elbert P. Tuttle; and Brief of Said Parties in Support of Exceptions at 36; Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception at 12; Brief of Amici Curiae Salt River Project Agricultural Improvement and Power District, Salt River Valley Water User's Association and Arizona Public Service Company at 28. But the Master's decision regarding the authority of the Court to consider these claims does not implicate the doctrine of res judicata or generally bring into question the binding effect on Indian tribes of a decree obtained by the United States. Indeed, the Master expressly stated that his recommendation that "the Court exercise its power under Article IX and reach

the merits of the 'omitted lands claim'" made "unnecessary any consideration of the arguments raised by the Tribes that due process prevents preclusion of them because they were represented in the prior proceedings by a party not in privity with their interests." Report at 54, n. 71.

Thus, the res judicata issues which the State Parties discussed in detail are not raised by the Master's report. To be sure, the question of the preclusive effect on Indian Tribes of prior federal representation of their private rights is a significant and troubling question, particularly when the federal government simultaneously represents its own interests which conflict with those of the Tribes. Permitting the bar of res judicata to foreclose the

assertion of obviously valid tribal claims in such circumstances would give rise to serious due process concerns. See Hansberry v. Lee, 311 U.S. 32, 41. The significance of that question requires it to be considered on the basis of a complete record demonstrating the scope and extent of the tribal and competing federal rights and the reasons for the government's failure to assert the full scope of the tribal rights in the prior proceeding[1/].

1 Compare United States v. T.C.I.D., 649 F.2d 1283 (9th Cir. 1981), modified 666 F.2d 351 (9th Cir. 1982), Petitions for Cert. pending U.S.L.W. June, 1982. In that case the record plainly establishes that the failure of the United States to assert the tribal fishery right stemmed from its fear of the impact of such a claim on its reclamation interests. See United States v. T.C.I.D., supra, 649 T. 2d at 1290-93. In that case, unlike this one, the United States has acknowledged its conflict of interest in the prior proceedings, admitted that its conflict

--continued on p. 12

See, e.g. Blonder-Tongue Labs. v. University Foundation, 408 U.S. 313, 333 ("(T)he patentee-plaintiff must be permitted to demonstrate, if he can, that he did not have 'a fair opportunity procedurally, substantively and evidentially to pursue his claim'"); Schroeder v. City of New York, 371 U.S. 208, 212; Hanson v. Denkla, 357 U.S. 235, 247; Walker v. Hutchison, 352 U.S. 112, 116; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306; Griffin v. Griffin, 327 U.S. 220, 228-29. While certain of the Parties here touched lightly on

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Footnote 1 continued.

adversely affected its representation of Indian interests, and contended that the application of res judicata to bar the Tribe's water rights which were not previously litigated would constitute a denial of procedural due process.

some aspects of those critical considerations, no full blown factual showing was permitted (see, e.g., Tr. 1523-24) and no findings were made. Report at 54, n. 71. The result is that, outside of the invocation of Article IX, the present record is not sufficient to address the issue of the preclusive effect of the earlier proceeding, since no explanation is given for the reasons underlying the Government's failure to assert these claims previously. Of course, the lack of factual findings on the United States' conflict of interest does not diminish the inequity to the Tribes resulting from the omitted claims -- a critical consideration relative to Article IX - but because the Master's decision does not turn on the denial of due process to the Tribes,

it also does not generally implicate the question of federal representation of tribal interests when substantial conflicts of interest are admitted and proved.

CONCLUSION

The Master's decision in this case turns on the unique circumstances of this case in which the earlier decree specifically provided authority to re-examine water entitlements of the Five Tribes. So, too, the Master's recommendation that the Court utilize this authority turned on the timeliness of the request, the lack of reliance by the State Parties and the unfairness to the Tribes of the earlier allocation. Thus, the Court should not be dissuaded from "correct(ing) an unjust result" (Report at 54) by the mistaken notion suggested by the State Parties and urged by Amici that to treat these Five Tribes fairly would lead to widespread attacks on the finality of other decrees in other cases. Moreover, this

case, in its current posture, does not properly present questions relating to the effect of the federal government's conflicts of interest on the rights of Indian tribes to procedural due process.

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